No. 06-17

Supreme Court, U.S.
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In The
Supreme Court of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner,

v.

EMERALD RIDGE SERVICE CORPORATION BOARD OF DIRECTORS, KENNETH SHAREEF, RENFORD BREVETT, MAUNDY MELVILLE, VALERIE LONGHURST, MARK MARTELL, RUTH VISVARDIS FERRY, JOSEPH & PEARCE, P.A. and EDWARD F. KAFADER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. PEARCE
FERRY, JOSEPH & PEARCE, P.A.
824 Market St., Suite 904
Wilmington, DE 19801
(302) 575-1555
Attorneys for Edward F. Kafader and Ferry, Joseph & Pearce, P.A.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the petitioner's complaint state a basis for the exercise subject matter jurisdiction over the matters alleged in the petitioner's complaint?

LIST OF ALL PARTIES

The caption contains all parties involved in the Circuit Court.

CORPORATE DISCLOSURE STATEMENT

Emerald Ridge Service Corporation is a corporation in the State of Delaware. It has no parent corporations. No publicly held company owns 10% or more of its stock.

Ferry, Joseph and Pearce, P.A. is a professional association in the State of Delaware. It has no parent corporations. No publicly held company owns any stock in the professional association.

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First Amendment to the United States Constitution 1, 7

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CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE INSTANT MATTER

Brooks-McCollum v. Emerald Ridge Service Corporation, C.A., No. 04-073 JJF (D.Del. Jan. 11, 2005).

Brooks-McCollum v. Emerald Ridge Service Corporation Board of Directors, 166 Fed.Appx. 618, 2006 WL 314460 (3rd Cir. 2006).

STATEMENT OF BASIS FOR JURISDICTION OF THIS COURT

Petitioner seeks Writ of Certiorari from a judgment of the Third Circuit Court of Appeals rendered on February 10, 2006.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment of the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1332(a) provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

1. citizens of different States;

2. citizens of a State and citizens or subjects of a foreign state;

3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

4. a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF CASE

This case arises out of the petitioner's involvement on the board of directors of a private neighborhood association. The petitioner was elected as a member of the Board of Directors of the Emerald Ridge Service Corporation in June of 2003. Subsequently, she was appointed Secretary and Treasurer of the Corporation by her fellow board members. By-law 8 of the Corporation provides that the board of the directors shall choose the officers of the Corporation. It also provides that any officer chosen or appointed by the Board may be removed either with or without cause by affirmative vote of the majority of the Board of Directors.

At a meeting of the Board of Directors held on December 29, 2003 the Board of Directors voted to remove Ms. Brooks-McCollum as an officer of the Corporation. Ms.

Brooks-McCollum resigned her position as a director of the Emerald Ridge Service Corporation on January 15, 2004.

On January 14, 2004 Ms. Brooks-McCollum filed an amended complaint in the Chancery Court of the State of Delaware captioned *Cathy D. Brooks-McCollum v. Emerald Ridge Service Corporation, Ken Shareef, Renford Brevett, Maundy Melville, Valerie Longhurst.* C.A., No. 147-N (the "Chancery Court case"). That Complaint alleged that the Board of Directors of the Emerald Ridge Corporation had violated various provisions of the by-laws and charter of the Corporation as well as various provisions of the Delaware Corporation Law. That action remains pending in Delaware Chancery Court.

On March 5, 2004 plaintiff filed a complaint in Superior Court of the State of Delaware in a case captioned *Brooks-McCollum v. Emerald Ridge Service Corporation,* Del Super., C.A., No. 04C-03-074-MMJ ("the Superior Court case"). The Complaint alleged various violations of the Federal Trade Commission Act, alleged the violations of 8 *Del.C.* §219 and also alleged that the defendants had failed to secure the agreement of the majority of the members of the Corporation to seek coverage under a directors' and officers' policy issued to the Corporation. That case has been dismissed.

On June 29, 2004 Ms. Brooks-McCollum filed her suit in the instant matter in United States District Court for the District of Delaware against the same defendants named in the Superior Court and Chancery Court cases. Her complaint added Edward F. Kafader and Ferry, Joseph & Pearce, P.A. as parties. Mr. Kafader represented the defendants in the Chancery Court and Superior Court matters. He is employed by Ferry, Joseph and Pearce, P.A.,

a private law firm. By Order dated January 11, 2005, District Court dismissed Ms. Brooks-McCollum's complaint, finding lack of subject matter jurisdiction. The District Court also denied all motions made by Ms. Brooks-McCollum in an Order issued on the same date.

Ms. Brooks-McCollum then timely filed an appeal from the District Court's Opinion and Order with the Third Circuit Court of Appeals. On February 10, 2006 the Third Circuit Court of Appeals issued an opinion affirming the District Court's dismissal of petitioner's claims for lack of subject matter jurisdiction and affirmed the District Court's denial of the motions the petitioner had filed.

ARGUMENT

THE PETITIONER'S COMPLAINT SETS OUT NO BASIS FOR THE EXERCISE OF FEDERAL JURISDICTION

A. There Is No Diversity of Citizenship Between The Parties.

28 U.S.C. §1332 confers jurisdiction over federal courts where the matter in controversy is between citizens of different states and the amount in controversy exceeds $75,000.00. The caption of the petitioner's complaint filed in District Court on June 29, 2004 lists petitioner's address as Bear, Delaware. The same caption lists the addresses for Ferry, Joseph and Pearce, P.A. and Edward F. Kafader as Wilmington, Delaware. An affidavit of Michael B. Joseph was filed with the District Court at the same time the motion of Edward F. Kafader and Ferry, Joseph and Pearce, P.A. was filed. Mr. Joseph's affidavit indicates that Ferry, Joseph and Pearce, P.A. is

a professional service corporation incorporated in the state of Delaware and operates its only office at 824 Market Street in Wilmington, Delaware. Mr. Kafader and Ferry, Joseph & Pearce, P.A. are both citizens of the state of Delaware. Ms. Brooks-McCollum also is a citizen of the state of Delaware. Therefore, there is no diversity of jurisdiction between the plaintiff and Mr. Kafader and Ferry, Joseph and Pearce, P.A. Section 1332 of Title 28 of the United States Code confers jurisdiction upon federal courts only if there is complete diversity of jurisdiction between the parties.

Although petitioner referred to 28 U.S.C. §1332 in her complaint as a basis of jurisdiction, it appears that the petitioner now recognizes there is no possibility for a federal court to exercise jurisdiction under the diversity statute in this matter. To the extent petitioner asserts diversity jurisdiction, she is requesting that this Court review a misapplication of a properly stated federal rule or law.

B. The Petitioner's Complaint Does Not Allege a Proper Basis for Federal Question Jurisdiction.

Since the District Court lacked diversity subject matter jurisdiction over the matters alleged in the complaint, it could only exercise subject matter jurisdiction over the case if the complaint sufficiently alleged a federal question upon which subject matter jurisdiction could be based. Federal question jurisdiction is set out in 28 U.S.C. §1331.

At page 2 of her complaint, the petitioner alleged that Mr. Kafader and Ferry, Joseph and Pearce violated various

sections of the Delaware Rules of Professional Conduct. At pages 33 and 34 of her complaint, petitioner appears to distill her claims against all of the defendants. It appears the only claim asserted against Mr. Kafader and Ferry, Joseph and Pearce, P.A. in this section of the complaint is a restatement of the violation of the Delaware Rules of Professional Conduct.

At page 1 of her complaint, Ms. Brooks-McCollum alleges that the defendants have violated rights guaranteed her by the First, Fifth and Fourteenth Amendments of the United States Constitution.

The respondents' challenge to jurisdiction in this matter was based upon the allegations contained in the complaint. As such the respondent's challenge is a facial attack. *Carpet Group International v. Oriental Rug Importers Association*, 227 F.3d 62 (3d Cir. 2000). When considering a facial attack on subject matter jurisdiction, the Court looks to the plaintiff's allegations contained in the complaint, considering those allegations in a light most favorable to the plaintiff. *Mortenson v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3d Cir. 1977). Ms. Brooks-McCollum's complaint does not allege that Mr. Kafader or Ferry, Joseph and Pearce are agents of the United States government, any state government or any subdivision thereof. In fact, neither Mr. Kafader nor Ferry, Joseph and Pearce, P.A. have acted as an agent of any governmental entity in this matter. In *Lugar v. Edmonson Oil Company*, 457 U.S. 922, 937 (1982) this Court stated the following:

> [T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained

> significant aid from state officials, or because his conduct is otherwise chargeable to the State.

In her Complaint, Ms. Brooks-McCollum makes no allegation indicating Mr. Kafader or Ferry, Joseph and Pearce were acting as a state official or acted together with state officials in depriving her of any constitutional rights. Therefore, the Third Circuit's affirmance of the District Court's dismissal was appropriate in this matter. Once again, the petitioner in this matter is seeking review of a supposed misapplication of a properly stated rule of law.

CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT K. PEARCE
FERRY, JOSEPH & PEARCE, P.A.
824 Market St., Suite 904
Wilmington, DE 19801
(302) 575-1555
Attorneys for Edward F. Kafader and Ferry, Joseph & Pearce, P.A.